

AFFIRMATIVE ACTIONS

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Liberals and progressives have been slow to realize that their preferred vocabulary has been hijacked and that when they respond to once-hallowed phrases they are responding to a ghost now animated by a new machine. The point is not a small one, for in any debate, especially one fought in the arena of public opinion, the battle is won not by knock-down arguments but by the party that succeeds in placing its own spin on the terms presiding over the discussion.¹

I.

The purpose of this brief paper is to unravel several quite different understandings of “affirmative action” in our personal conduct toward one another, and in our laws. More specifically, the purpose is to separate varieties of affirmative actions that do not countenance racial stereotyping, labeling and various forms of racial discrimination—whether personal or impersonal—from actions and programs that routinely engage both of these practices such as they are. The first principle of acting *affirmatively* toward others, as one first grasped that principle even as a child, has nearly passed us by. In its place, a different usage of acting affirmatively toward others—action often described as “race conscious” action (acting “in light of each person’s race”)—has tended to erode, and so to displace

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1. STANLEY FISH, *THE TROUBLE WITH PRINCIPLE* 312 (1999). (Professor Fish, my former colleague, knows well whereof he speaks, indeed, he practices what he preaches with unblushing gusto, the better to “preside” over discussions in the arena of public opinion such as he would like them to be conducted on just the terms as he suggests.)

that principle, to disparage it, even reverse it, effectively to take over the usage. Indeed, it has become ordinary to have only this latter day usage in mind when speaking of affirmative actions—that it is somehow “*affirmative action*” for institutions and for government to install racial classifications, to employ various racial classifications to register each of us by race, and to consult that registry to measure what each is to receive—to each (if merely in some “appropriate” measure) according to race.²

2. So, for example, “to each according to race” (if merely of course in some “appropriate” measure) *in employment*, pursuant to which notion each job applicant is to be identified by race, and each assigned an “eligibility according to race,” in the award of government contracts, participation in public works projects, or even mere on-the-job training for possible advancement in one’s employable skills. *See, e.g., United Steelworkers v. Weber*, 433 U.S. 265 (1979) (racial classifications and racial queuing for job training); *Fullilove v. Klutznick*, 448 U.S. 265 (1980) (racial classifications for bypassing unfavored firms on public works projects); *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (racial classifications for awarding city contracts by race); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) (racial classifications for subcontractors as well). And so to say, also, not merely “who next (by race) shall be hired,” but later—when there is a downturn—likewise to declare “*who next (by race) shall be laid off*.” (*See, e.g., Wygant v. Jackson Bd. of Education*, 476 U.S. 267 (1986); *Taxman v. Piscataway School Dist.*, 91 F.3d 1547 (3rd Cir. 1996), *cert. granted*, 521 U.S. 1117, *cert. dismissed*, 522 U.S. 1010 (1997)).

And so likewise, even in respect to admission to a state university medical school or, indeed, even a state university *law* school, where applicants are requested to identify themselves by race, then to be measured for admission by race, thus to determine “who shall be admitted” and *who*—all things considered (including their race)—*shall not*. (*See, e.g., Texas v. Hopwood*, 78 F.3d 932 (5th Cir.), *cert. denied*, 518 U.S. 1083 (1996) (racial classifications for university admission); *Regents of California v. Bakke*, 438 U.S. 265 (1978) (same); *DeFunis v. Odegaard*, 416 U.S. 312 (1974) (same); *Wessman v. Gittens*, 160 F.3d 790 (1st Cir. 1998) (same, even for public schools); *Tuttle v. Arlington County School Bd.*, 195 F.3d 698 (4th Cir. 1999) (same). But we are far from being done with the shadow of the new “affirmative action” state. For so, too, shall citizens be identified (from racial census forms and by census tract by race), the better to bundle them into racial voting districts, deliberately to concentrate racial densities (“to each his own according to race”) etched onto “race-conscious” segregated gerrymandered maps. *See, e.g., Miller v. Johnson*, 515 U.S. 900 (1995); *Shaw v. Reno*, 509 U.S. 630 (1993). *See also Wright v. Rockefeller*, 376 U.S. 52, 59-67 (1964) (Douglas, J., dissenting).)

These newer, explicit race-based ("race-conscious") actions, although now quite entrenched, and not currently (i.e., not yet) regarded as unconstitutional,³ nonetheless tend to divide nearly every Commission on Civil Rights even as they also trouble our courts. They do so and they will continue to do so (as they must so long as they endure), foundationally, I believe, because of what they *do* to us and what they instruct us likewise to do unto others in turn. All presume to label each of us by race, and all presume to fix us into racial classes, even as these racial classes may themselves shift, change, and mutate, even from place to place and from time to time. Categories of racial identity are made to define us, even as they at once also presume to inform us how each shall be used, treated, and assigned. Institutional and governmental directives instruct us to do this same thing to others in turn, i.e., to identify them likewise by race and, accordingly, sort and classify each—so "affirmatively" to use them by race as well.⁴

3. Whether they are regarded as unconstitutional merely shifts with the circumstances and shifts also—perhaps most frequently—with who happens to sit in authority so to say. See, e.g., the cases cited *supra* note 2. But see *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984) (Burger, C.J.) (emphasis added) ("A core purpose of the [Fourteenth Amendment] was to do away with *all* governmentally imposed discrimination based on race") and *infra* notes 50-53 and accompanying text.

4. As is represented in the many cases collected in note 2 *supra*. So, for example, as noted by Justice Stevens, dissenting in *Fullilove v. Klutznick*, 448 U.S. 448, 532 (1980), "The 10% set-aside contained in the Public Works Employment Act of 1977 (Pub. Law No. 95-28, 91 Stat. 116) creates monopoly privileges in a \$400 million market for a class of investors defined solely by racial characteristics." *Id.* As Stevens noted, "[t]he statutory definition of the preferred class include[d] 'Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts.'" *Id.* at 535. Essentially the same facile categories—categories "defined solely by racial characteristics"—were used still again by Congress in the Surface Transportation Assistance Act of 1982 Pub. Law No. 97-424, 96 Stat. 2097 (1983). The profitability of these highly lucrative racially-defined set asides reportedly led to a 25 percent fraud rate in highway contracts in some jurisdictions, e.g., New Jersey. (See Johnathan Friendly, *Road Contractors Found to be Evading Anti-Bias Law*, N.Y. Times, Nov. 30, 1984 at B5.) Anticipating that problem and others, Justice Stevens went on to observe (in *Fullilove*) the way these matters will then tend to play themselves out: "If the National

Government is to make a serious effort to define racial classes by criteria that can be administered objectively [so for example merely to avoid false counting or otherwise], it must study precedents such as the First Regulation to the Reichs Citizenship Law of November 14, 1935." *Fullilove*, 448 U.S. at 534 n. 5 (alteration in original). See also BORIS BITTKER, *THE CASE FOR BLACK REPARATIONS* 91-104 (1973) (expressing the same point in more general terms).

But so, in fact, Justice Steven's prophecy *already* has come to pass in some degree, and so too it has *always* been and will *always* be, when "race" is to define us, and used also to measure "our" place. So, today, for example, public interest has already produced a tide of ink spilled on sports pages and elsewhere in the voyeuristic and singular quest to say, "what 'race' is Tiger Woods?" And, indeed, who is to say? *Whose* racial classifications shall "we" adopt and use against each other, as we measure each other by race?

In one government's view according to its tidy taxonomy of listed races, Tiger Woods would be deemed to be of "mixed race." See *Hunter v. The Regents of The University of California*, 971 F. Supp. 1316 (C.D. Cal. 1997), *aff'd*, 190 F.3d 1061 (1999), *cert. denied*, 121 S.Ct. 186 (2000) (sustaining restrictive admission quotas of four-year old children by strict racial proportion of urban school age population according to race, in state "experimental" elementary school, using six racial categories: (1) "African-American;" (2) "Asian-American;" (3) "Native American;" (4) "Latino;" (5) "Caucasian;" and (6) "Other (Mixed Race).") And so, in the *Hunter* case, the particular young four-year old girl denied admission, was described as "one-quarter Japanese and three-quarters Caucasian;" it put her into the school's "category" quota for children neither "Asian-American" nor "Caucasian," but of "mixed race," a category already filled, and so on that account, she was turned away.

To be sure, just like that child, to a greater or lesser extent, most of us are *also* "mixed" (the identification of a "pure" race is problematic bordering on the fanciful and ludicrous). (See e.g., *St. Francis College v. Al Khazraji*, 481 U.S. 604 (1987). See also LUIGI LUCA CAVALLI-SFORZA, *GENES, PEOPLES AND LANGUAGES* (2000) (noting, among other matters, that Europeans are, in their own ancestry, about two-thirds Asian and one-third African, and noting also that genetic variations *between* any two alleged "races" are in fact characteristically *fewer* than within one). (See also Edward Rothstein, "Dismantling Race and Unifying the Human Species," N.Y. Times, April 1, 2000, at B9 (reviewing Cavalli-Sforza).)

Yet, though this is plainly so, quite in contrast, for U.S. government census purposes, in this year 2000, neither we, nor the child turned away in the *Hunter* case, nor (even) Tiger Woods *can* be of "mixed" race. Why? Because the government's explicit *race*-labeled categories, as they are expressly labeled for the 2000 census, provide *no* such category, and indeed they *deny* any identity of this very widely-shared kind. Nor is it an accident that this is so. Rather, a proposal

to include such a category was put forward and formally rejected in turn (see discussion *infra* this footnote), deliberately to forbid any person from presuming to identify himself or herself as of "mixed race."

On these mandated census forms, moreover, individuals who list themselves by checking *more* than one "race-category" box (so to reflect what they believe most accurately reports the fullness of their family history no part of which they want to disparage by omission) are not to be counted as of "mixed race" (there being no such permitted counting) nor, of course, are they to be counted twice. Rather, for counting, their multiple designations are to be *ignored* and they are then at once to be *assigned* (i.e., "counted") merely to one or another of the "minority" boxes (e.g., as just "black"). And just *why* is that? The objective was to keep the largest possible number of persons to be designated among various "minority" "races," such as they are defined to be. See Steven A. Holmes, "The Politics of Race and the Census," N.Y. Times, Sunday, March 19, 2000, § 4 at 3 (noting how the OMB proposal to include "mixed race" as requested by quite a substantial number of people was abandoned and how it was decided "that people who list themselves as part white and part minority will be counted as a member of that minority group" irrespective of how they think of themselves or indeed designate themselves, or want to be considered (not by race at all); WARD CONNERLY, CREATING EQUAL: MY FIGHT AGAINST RACE PREFERENCES 22 (2000) (noting organized insistence that the census forms: (a) require one to record one's "race," but also; (b) that there be no box for "mixed race," ruling out any such designation from apprehension that too many would check it were they given the choice). And for a systematic review of the unstable categories of "race" deployed by the U.S. Census for decennial census-gathering purposes, from 1790 through 1990, see MARGO J. ANDERSON AND STEPHEN E. FEINBERG, WHO COUNTS? —THE POLITICS OF CENSUS-TAKING IN CONTEMPORARY AMERICA 167-190 (1999) (and see pp. 172-73, noting strenuous NAACP opposition to providing any category in the census of 2000 to be designated as "multiracial").

For an additional and still more comprehensive review, of the shifting, strikingly nonuniform categories of "race" currently fashionable with the federal government for imputing "race," aside from mere census boxes, see Richard Ford, *Administering Identity: The Determination of "Race" in Race-conscious Law*, 82 CAL. L. REV. 131 (1994). And then, having done that, for an instructive review of things as they also were, when this manner of cataloguing and of treating people was similarly fashionable in past state—and national—practice, see Donald Braman, *Of Race and Immutability*, 46 U.C.L.A. L. REV. 13, 1392-1410 (1999), a lengthy article collecting the inconsistent, shifting—and shifty—categories of "race" formerly deployed by Congress itself, as well as by many states, prior to and following, the fateful case of *Plessy v. Ferguson*, 163 U.S. 537, 538, 549 (1896).

Regimes of racial ordering thus tend to describe the ordinary wherever we turn, closing in upon us, whatever our disinclination may be ever so to be treated or so to treat others as we are

Plessy was of course that most noteworthy case sustaining the discretion of a state legislature, if it wished, so to classify a given person as "colored" for purposes of assigning seats by race, treating with sublime indifference (as the Supreme Court held that it could) his uncontested claim that he was "of seven eighths Caucasian and one eighth African blood," the Court declaring, however, that whether that might be so, it was inconsequential; for once it is conceded that a state may make provision to "allocate seats" (sic) by race (as the Court held that it was permissible in *Plessy*, and as states still seek to do today—as in *Bakke* and elsewhere), "*the power to [do so] obviously implies the power to determine to which race the passenger belongs*" for that purpose, exactly as the state presumed so to do—and so again, today, "affirmative" action laws, as well as the U.S. census, continue to do to each and all of us.

—And thus, to complete this brief review, so it is even now with each of us, even as it is with four-year-old (pre)school children and with Tiger Woods: we *cannot* be either of "mixed race," nor for that matter merely of "the human race," no matter how much we would prefer so to be regarded or want so to regard ourselves—"the law" even of the census, like so much else of "the law" (i.e., the racial classification laws of the 'affirmative action' state) denies us the option so to be registered; it will brook no such evasive answers, even as it brooked none in *Plessy v. Ferguson*, a full century ago.

What a fine business all this once was—and has become once again—as we invite, impose, assign, and create various "tests" and ingenious ways of "identifying each by race." And *why* do we still do this, and not just to "allocate seats" as was done in *Plessy*—and was done again in *Bakke*—but racially to allocate so much else as well, as we *still* presume to do? Just what *is* it that one thinks one has succeeded in doing when one has at last captured others in one's endlessly-contrived categories of "race?" (Cf. Toni Morrison, Nobel Laureate in literature (CBS television *Sixty Minutes* interview, March 8, 1998): "When you know somebody's race, *what* do you know? Virtually nothing.") Perhaps, indeed, even as Ms. Morrison suggests, one knows very little—virtually nothing at all about who that person is or what they are like, their skills, desires, dreams, and hopes. Doubtless in all these respects, her point is unassailable. Still, when one's own government makes up its categories for identifying its own citizens in this fashion, and proceeds from there to allocate opportunities under law in keeping with its nice race lists, one knows something, to be sure, though few may feel comfortable to have it declared—that one endures in a "racial state," i.e., a state that regards "race" as a *defining characteristic*, indeed, a state that *makes* it so by the very actions it takes so to make race a matter that counts however others would not have it so.

nonetheless directed to do. We are assessed according to “our” race, squeezed and boxed, collapsed inside our labeled race categories, such as they are made to be. Ambiguous messages are coded into our racial categories, and this is the face of the new “affirmative action” state.

Perhaps the mere commonplace nature of this now nearly-habitual practice of “registering by race” (then to be assigned or not, admitted or not, or excluded or measured in some way, if just to wait one’s turn in some designated racial queue) has dulled an original unease—that even as *children* we did not understand that *this* is how we would be treated, much less did we understand that this is how we would be expected to treat all others as well, so to register and to be registered by race, and so to be regarded by public authority from then on.⁵ And, to be sure, many who write on these matters express no misgivings. Indeed, they seem not merely willing to register themselves (and everyone else) by race, rather, they express a certain mistrust and skepticism toward those unable to share their enthusiasm. Others, not necessarily sharing that enthusiasm, may, in any event, see themselves as having been given little choice except to participate, so to register and to register others by race, and so to collaborate in these race-based actions such as they are, whatever their personal misgivings may be. For as they are often given to understand matters, if *they* fail to register by race or are unwilling to register and to treat others by race just in the manner and degree they are asked or directed to do, they may simply be passed over, or passed by, in favor of others of a more willing disposition so to register by race and so to treat others in

5. See, e.g., *Tuttle v. Arlington Cty. School Bd.*, 195 F.3d 698 (4th Cir. 1999) (Judge Sam Ervin III noting in the last opinion he wrote just before his death, the manner in which public authority expected (indeed required) racial labels be fixed by parents to their own children registering for preschool, in contemplation of how they will be assigned: “We find it ironic that a Policy that seeks to teach young children to view people as individuals rather than members of certain racial and ethnic groups classifies those same children as members of certain racial and ethnic groups”. *Id.* at 707). See also generally *Eisenberg v. Montgomery Cty. Pub. Sch.*, 197 F.3d 123 (4th Cir. 1999), *cert. denied*, 120 S.Ct. 1420 (2000) (same practice).

the prescribed manner in which the government *wants* race to be made to count.⁶

To be sure, our immediate interest here is ostensibly more modest than to revisit matters of this larger sort (though review them in some measure we cannot altogether avoid nor should we seek to do). Rather, the immediate topic is merely to compare different understandings of “affirmative action” in its different usages over time. Yet even this much—this “mere” review such as it may be, can be useful if just because, indeed, there has been no uniform understanding of what it is to act affirmatively toward others. Or, rather, it is closer to the record of recent history to say that what was once the understanding has been lost, misplaced, in large measure turned nearly upside down as we shall see.⁷

6. To be sure, however, even as I shall argue briefly hereafter, even if this is so, perhaps it is nothing that ought to matter to genuinely affirmative people such as they are. Any such person may rather accept the consequences of failing to be “suitably race-conscious” if *this* is what it is to mean: to register themselves (and likewise so to register others) by race (“white,” “black,” “mixed,” “Asian,” “Hispanic,” etc., crude cardboard caricatures all), to be filed, measured, so then to be “appropriately” treated, assigned by race. *Affirmative* people will not act in that way—the only “race” they will inscribe for themselves is as a member of the one they can share—the human race. So, it is in this testing (in how we respond to these matters), such as it is, that we may come to know ourselves—even as we want also to be known—in the way we pursue our hopes and interests in life. (See also N.Y. Times, April 19, 2000, at A27 (review by science editor of Popular Science, giving reasons for objections to the “race” categories of the census, concluding that “for those who can find no classification they like, I invite [them] to join me in considering themselves members of ‘some other race’—the human race.”); Richard De La Sota *Census*, L.A. Times, April 9, 2000, at M4 (“I just completed the 2000 census [asking] if I am Spanish/Hispanic/Latino.” “My father was born in Veracruz, Mexico. His father was a Basque who emigrated from Bilbao. My mother was born in South Dakota whose forbears came to this country in the 1630s and her mother was born in this country of recent Dutch immigrants.” “How do I answer the Spanish/Hispanic/Latino question? Someday, we will look back at these census forms in disbelief that the government actually classified people by race.”)

7. Contested usages of “affirmative action” have recently figured prominently in efforts to gain control over the description of ballot measures meant to bar government from discriminating racially. See, e.g., *Lungren v. Superior Court*, 55 Cal. Rptr.2d 690 (1996) (rejecting an effort to compel change

Even this more limited subject, i.e., of the differing understandings of the term “affirmative action” as part of our modern legal landscape, is itself tangled in spidery subtleties of various state and federal statutes. Here, however, I do not think it useful to extend this brief paper by duplicating within it the kind of particularized statute-by-statute (and program-by-program) review others have elsewhere already provided of this heavy and technical thicket of law. Here, instead, I mean simply to advance on the subject in a more general way, to distinguish actions I think once *were* known to represent “affirmative action” from those that, however they now lay claim by way of pre-emptive entitlement to the label, are something very different in kind. We turn to notice this drift, then, if just to trace several previous meanings of affirmative action, such as they once were (and might still be for all of us), and such as they have now pretty much been left behind.

in ballot-label description of California Proposition 209, to force its description as a measure “to prohibit affirmative action,” the court agreeing that such a revised description would be misleading. *See also* Blum v. Lanier, 997 S.W.2d 259 (Tex. 1999); the Texas Supreme Court recently reached the same conclusion in the course of affirming a state district court decision invalidating referendum returns narrowly rejecting a Houston citizen initiative measure modeled on Proposition 209 (which passed by a significant majority in California and is today fully in effect in that state as is equally the case in Washington as well). Over the unavailing objections of the measure’s proponents, the city council directed that the proposal be described on the ballot as a measure to prohibit “affirmative action.” The Texas court agreed that this description, prejudicially superimposed by the council on suggestion of the (outgoing) mayor, was unwarranted and so likely to have confused the voters to a degree affecting the outcome (i.e., that but for the question-begging description given the measure it might well have passed). (*See* WARD CONNERLY, CREATING EQUAL: MY FIGHT AGAINST RACE PREFERENCES 214-217 (2000)). As the court quite rightly noted in *Lungren*, and as the Texas courts acknowledged as well, there are varieties of affirmative action unaffected by a firm constitutional resolve to stop the state from using *any* person’s race, sex, color, ethnicity, or national origin as a measuring rod for determining their rights. A principal object of this revised and updated paper is to suggest that, indeed, this is so and that the better forms of acting affirmatively never reduce anyone to some classification they are to be made to fit by (a) assigning “their” race, and (b) using “their” race to measure “their” rights.

II.

There are, in fact, not less than four distinct usages of affirmative action that do *not* involve any kind of racial classifications to which people are assigned and by which they are then measured by race. We may understand each—and distinguish all of them from current racial registration/racial discrimination policies—in the following few steps.

A. The first and in fact a most obvious way of acting affirmatively—the most obvious use of “affirmative” action as an original proposition—as one might even now regard it in its strongest form, even as one might consider it if just briefly, here, at the beginning, is unburdened by technical jargon and nice distinctions. Indeed, it has already been suggested in my introductory remarks. It is just a normal ordinary way of acting toward others, without supposing one “*already knows something*” enabling one to judge them in advance. It is secured easily, indeed, it is secured by nothing more (for there is—and need be—nothing more) than a personal disposition to think well of people overall, and by a straightforward desire to treat all whom one encounters in all of life’s encounters as their *own* person utterly free of *any* reductionist stereotype by race. It takes each to be, rather, a whole person (even if “merely” a person) one ought not treat in any other way—to count or discount by race, to grade or degrade by race, to sort through, to arrange, or presume to assign to some “racially appropriate” queue.

Affirmative action of this kind is unqualified, universal, wholly affirmative, and unimprisoned by race. It is also a commitment, to oneself, as to others, even as it can be also a straightforward commanding way of life. And *as* a way of life, it has its fixed principle, fixed in an utterly transparent way. It provides to each who subscribes to it a clear and an *unencumbered* way of living, as well as of teaching. It accompanies one through life and frames one of life’s categorical imperatives by which one seeks to live out one’s life as best one can hope to do. It stretches through all that one does. It “knows” no stereotype by race. Indeed, it declares that

genuinely affirmative people, committed to each other, will hold out from *any* form of racial discrimination, and they will do so regardless of how others conduct themselves. And in keeping with that commitment, it also necessarily declares that one will neither “register” by race, so to imply a willingness to be treated or to treat others as different from oneself on that account, nor shall one ever solicit others so to do. As we would not want so to be treated, so neither shall we treat them.

B. But acting affirmatively does not stop with this principle. There is a well-recognized second—*and strongly reinforcing*—usage of “affirmative action.” It exhibits no inconsistency with, nor departure from, this first principle such as that first principle is. It is action extending to all of the unstinting actions one may take to attest to one’s commitment to others—that no racial discrimination will seep into or be a part of any enterprise or activity that is subject to one’s power of management or of institutional control. These *affirmative* (“pro-active”) measures, as they are meant to be, are forthcoming simply the more forcefully to show that one is in earnest—and can be seen and known by all to be in earnest—in respect to the commitment one has made. And quite usefully, a single concrete example of the use of the term “affirmative action” in just *this* specific sense, moreover, will but handily illustrate how the formal phrase *used* to be well understood even in formal government practice for a number of years. The example is furnished by the Executive Order, 11246⁸ (an Order applicable to federal contractors), issued in the administrations of Presidents Kennedy and Johnson in the ‘Sixties. In fact, the original executive orders used the phrase “affirmative action” solely in this complementary way.

Specifically, in its application to federal contractors, Executive Order 11246 required each such contractor first to furnish an enforceable assurance (in writing) that the contractor would not engage in *any* racial discrimination, i.e., that each such contractor would act in fact to live up to this absolutely clear—and clearly

8. See Executive Order No. 11126, *reprinted in* 42 U.S.C. § 2000(e) (1994).

understood policy—regardless of what others (namely, those not engaged in federal contract work and thus not subject to the executive order) might or might not presume to do or why. Next, in keeping with that policy, every such contractor was further obliged to take *affirmative* action (as the words appear in the executive order itself), the better to assure that its commitment could be relied upon—that there would be no racial discrimination in its practices and policies, in meeting the contract specifications, such as those specifications might be. Note, accordingly, *exactly* what was the commitment of the contractor in taking affirmative action:

The contractor will take affirmative action to *ensure* that applicants are employed, and that employees are treated during employment, *without regard* to their race, color, religion, sex or national origin.

The requirement is of steps to be taken by way of “affirmative action” of what kind? —As the Executive Order specified, namely, of a kind to *ensure* that applicants “are employed, and that employees are treated during employment, without regard to their race, color, religion, sex or national origin.”

The expected measures were thus to be precautionary and preventive measures, i.e., to prevent discrimination to figure in any way within the practices or policies of those benefitting from federal contract work. These measures were to be taken by and at the expense of the contractor from concern that were they not taken, some racial discrimination might otherwise occur and yet, absent the required “affirmative action” being undertaken by the contractor, go undetected and/or uncorrected, as the case might be. The expected affirmative action was not to have applicants and employees treated differently (i.e., differently by race, by color, by religion, or sex or national origin) but the same. And the better to assure that they *would* be treated the same, “affirmative action” was expected and required of federal contractors, specifically, to such things as the furnishing of special personnel to whom complaints of suspected discrimination might be carried, with authority to intervene and discipline those involved. It similarly extended to an

affirmative obligation to provide express notices inclusive of information respecting modes of redress individuals are thereby advised are available to them, and to a duty to include suitable provisions in contracts with subcontractors submitting such subcontractors to the same commitments as they themselves agreed to honor and to observe. It extended to provisions respecting records to be maintained in the employment office and elsewhere, available for periodic review to ensure that all applicants are treated fairly (that is, without discrimination) to the end of ensuring the integrity of business practices from the vices of racial discrimination of any kind.

All of this, such as it was required of federal contractors, one may well say was, to be sure, appropriately called "*affirmative*" action. It was affirmative action strictly reinforcing of our original definition, moreover, because all of it merely sought the *better* protection of *each* person from any manifestation of racial discrimination that might otherwise occur and yet go ignored—it sought to insure that there would be *none*.⁹ Thus the commitment to this kind of action reinforced a strong, straightforward national policy in respect to those who sought contracts underwritten by the treasury of the United States. It was action to be undertaken

9. For confirmation, see also JOHN D. SKRENTNY, *THE IRONIES OF AFFIRMATIVE ACTION* 7, 134 (1996) ("Executive Order 11246 obligate[d] government contractors not to discriminate on the basis of race, color, creed, national origin, or sex. ***[T]he contractor was to make a special effort to ignore race, and to affirmatively ensure that specific individuals were not harmed by their race."); Frank and Joseph Andritzky, *Affirmative Action: The Original Meaning*, 17 LINCOLN L. REV. 249, 255-262 (1987); LYNNE EISAGUIRRE, *AFFIRMATIVE ACTION* 8 (1999) ("The longest standing, federal affirmative action program (sic) has its roots in World War II. An executive order barring discrimination in the federal government and by war industries was issued by President Franklin D. Roosevelt in 1942. ***[P]resident Kennedy in 1961 created the Committee on Equal Employment Opportunity and issued Executive Order 10925, which used the term 'affirmative action' to refer to measures designed to achieve nondiscrimination."); FAYE CROSBY AND CHERYL VANDEVEER (eds.) *SEX, RACE & MERIT* 199 (2000) ("[O]n September 24, 1965, President Johnson signed Executive Order 11246, which mandated that all federal contractors take actions to make sure that they do not discriminate.").

consciously, in brief, to vindicate more effectively, a commitment opposed to racial discrimination in government contracting, equally in respect to race, as with sex, religion, or national origin.¹⁰

C. Consistent with each of these mutually-reinforcing understandings of affirmative action, there is yet a third, quite distinguishable, yet itself in no way departing from the strictness of nondiscrimination either in principle or in practice. Rather, even as suggested by the very apt phrase with which this form of affirmative action became positively associated, this extended kind of affirmative conscientious action sought the elimination of "gratuitous barriers," thoughtlessly maintained practices, unexamined "rules" or "standards" that gratuitously foreclose some from being considered and treated exactly the same as others and always still without distinction, fear, or favor, for being white or black, Hispanic, Latino, or Asian, Pacific Islander, Inuit, or Indian (or however else the shifting charts of racial classifications would seek to identify people and presume to dispense or allocate their opportunities and rights). This additional development simply took into due account a proposition we each recognize in its general form, and ordinarily do respond to when we see it in *other* people's operations, but somehow still manage to lose sight of from time to time in the management of our own affairs, such as they are, and thus by mere neglect fail to correct.

So, for example, to illustrate the point at a general level, it is the observable tendency of proceeding as we sometimes do from mere unexamined habit or custom, to *assume* the need and continuing

10. To be sure, even as Skrentny, the Andritzkys, and others were to note, this is *not* the manner in which the Executive Order subsequently came to be applied. Over time, even as acknowledged in the very title of Skrentny's book (i.e., the "ironies" of affirmative action), and even as occurred likewise in the subverted "interpretations" of Titles VI and VII of the Civil Rights Act of 1964 (see discussion in text accompanying nn. 40-47 *infra*), the phrase, "*without* regard to . . . race" came to be (re)interpreted to mean something very different and opposite (namely, instead, "*with* due regard to . . . race," whatever that might mean, but assuredly meaning in practice *actively* to consider each applicant's "race," such as it might be, and *actively* to make it "count" in determining their employment, their conditions of advancement, etc.)

relevance of certain things without particularly realizing as we might (were the matter given appropriate thought) that these things or requirements—as they may be pretty much as we have just taken them for granted—may in fact be quite unnecessary in that they actually count for very little and indeed may be mere anachronisms of unexamined practice in the way we manage our affairs. Even so, they are not harmless, rather, they impose considerable hardship and real costs on others even if not on us, and quite unnecessarily so. They may well, therefore, be appropriately re-examined to determine whether they might be abandoned or changed. And so one will move and act *affirmatively* to do, if just to avoid the obtuseness of our prior practice and the adverse effects that practice has on those whom it tended to shut out.

Straightforwardly, any process that pursues any such course of open review and of revision as this, is itself one that can lay a strong and rightful claim to the title of “affirmative action”—action undertaken consciously so to reduce gratuitous differential treatment of persons not necessary to distinguish in the manner one’s customary practice did so distinguish them to their disadvantage even if just inadvertently, rather than by any conscious design. One acts affirmatively by being sensitive to this possibility and—by acting affirmatively—one avoids it. There is nothing mysterious in how this works.¹¹

11. Indeed, the simplest sort of example of this kind of “affirmative action” (to eliminate gratuitous barriers) comes not with any special reference to race at all, but comes, rather, in the nearly complete elimination of “gratuitous barriers” of a literal physical kind—i.e., the elimination of curb barriers affecting sidewalk access at ordinary street corners in innumerable cities and towns. “Standard” street curb construction used to carry the edge of the ordinary street curb continuously around every intersection corner. That manner of constructing curbs made passage across intersection difficult for some persons, even while it contributed little or nothing essential to public safety or convenience overall. Once the matter was noticed, albeit it was very slow in coming, it was pretty quickly acknowledged that changing the technique of curb and sidewalk construction (merely to provide a smooth gradient entry onto the sidewalks at intersections) would cost no more and indeed in some circumstances cost even less than the standard design, even as it would greatly facilitate better access for persons previously frustrated and put at risk by the older practice. The simple

In respect to this form of affirmative action, one portion of Title VII of the Civil Rights Act of 1964 merely picked up on this general idea and directed it to employment practices.¹² In brief, one feature of Title VII imposed an affirmative obligation on affected employers to review their employment criteria, to take due care that they were suitably job related rather than the mere residue of custom or habit—like unnecessary curbs obstructing sidewalk access.¹³ The same obligation of employment practice review

design change improved matters greatly for many. Meantime, neither did the changes adversely affect access by existing users in any way. (A simple and elegant example of "affirmative action" of this constructive kind at work.)

12. The pertinent statutory provision is 42 U.S.C. § 2000e-2(a)(2). *See also* Griggs v. Duke Power Co., 401 U.S. 424 (1971). The Age Discrimination in Employment Act of 1967 (29 U.S.C. § 623(a)(1)) and § 2000e-2(a)(2) are framed identically. On the other hand, there is no equivalent provision in any of the Reconstruction Civil Rights Acts (42 U.S.C. §§ 1981, 1982, 1983, 1985), and the Supreme Court has declined to interpret them as though there were. These statutes, therefore, prohibit only the explicit use of race itself as the differentiating criterion or the use of a deliberately selected surrogate criterion. *See* General Bldg. Contractors Ass'n v. Pennsylvania, 458 U.S. 375 (1982); Memphis v. Greene, 451 U.S. 100 (1981). The same observation should also apply equally to the Fair Housing Act of 1968 (42 U.S.C. § 3601 *et seq.*), but the Supreme Court has not yet addressed the question (*see* Village of Arlington Heights v. Metropolitan Hous. Rev. Corp., 429 U.S. 252 (1977)). In the meantime, several courts of appeal have presumed to read into that act the same "disparate impact" standard as is provided by Title VII. (*See* Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights, 558 F.2d 1293 (7th Cir. 1977), *cert. denied*, 434 U.S. 1025 (1978). *See also* discussion and numerous cases collected in *In re Malone*, 592 F. Supp. 1135, 1165-66 (E.D. Mo. 1984).)

13. For example, at "time 1," it may well be the case that one's performance even on a mere "paper and pencil" test is well matched to reflect the kind of skills identified to a given line of work or a given course of study. Let it be so. Still, to the extent that the nature of the work or course of study may have *changed* considerably since time 1, continued reliance on scores reported from that same (unmodified) test as such, may now—at time 2—produce two kinds of errors such as they tend to be: (a) it yields a number of "false positives" (i.e., the test will *overpredict* how well those who score well on the exam will succeed on the job or in the course of study, when in point of fact they may not); (b) it also yields a large number of "false negatives" (i.e., the test will *underpredict* how others, scoring less well on the test, would have performed at least equally well or perhaps better than any number of their "higher" scoring counterparts—but were

extended likewise to a review of customs of advertising job notices, to take care that able people might not be overlooked by the limits of one's former and rather narrow recruiting patterns (as, for example, relying solely on a union hiring hall for all job referrals might tend to do).

To be sure, the *extent* to which this kind of affirmative action is—or ought to be—required, especially as it has sometimes been very aggressively pressed by various federal or state agencies, can become a matter of fair debate, uncertainty, or worse. One ought not gloss over the problem, such as it can readily become and in

given no opportunity to do so, on account of having already been excluded from further consideration (because, of course, they “failed” or did less well on the test). Title VII is concerned principally with those within this latter group, and no doubt rightly so. Their exclusion was, in a word, “gratuitous.”

But note, of course, the unfairness of continuing to use the test in thus excluding the persons in this latter group—“poor” scorers on a test not in fact a fair test in respect to their ability to do well in the job or course of study for which they apply—is an unfairness to each of them thus excluded (whatever their “race”). Title VII is not, however, much concerned with this, though perhaps it, or some more general civil rights law, ought to be.

Title VII is typically “triggered” once an adversely affected party (or the E.E.O.C.) makes a *prima facie* showing of more-than-trivial disparate impact by “race” (or by “sex, religion, or national origin”) between the composition of the larger group of all who applied for the jobs then available to be filled, and the smaller group of those making it past the “cut off” score of the test then in use. In general, where the disparity in impact is more than 20%, the employer must be ready to make a convincing demonstration “that the challenged practice is [both] job related for the position in question and consistent with business necessity;” otherwise the employer may not continue its use. See 42 U.S.C. § 2000e-2(k)(1)(A)(i). On the other hand, an employer solely concerned with *avoiding* inquiry by the E.E.O.C. may merely want to ensure that the proportion of his employees who are, say, “black,” is not significantly smaller than the proportion of such persons in the original applicant pool. Accordingly, if indeed that is his sole concern, rather than undertake any serious review to check his “test-score” method of employment, as he should, he may merely take steps to make quite sure his work force is racially-composed in a “satisfactory” way. To do so, he will pursue a covert practice of racial discrimination against “white” applicants, to ensure he has a suitably “balanced” work force. See, e.g., *Connecticut v. Teal*, 457 U.S. 440 (1982) (reviewed and discussed *infra*, n. 17).

some measure no doubt as it already has. The steps one may sometimes be pressed to take by certain agencies become ever more doubtful as "affirmative action" of this kind at the point it becomes doubtful in turn whether the practice a particular agency may press to be changed is in fact "gratuitous." Eventually, one cannot avoid asking just *why* a *particular* kind of change is being pressed as vigorously as it seems to be? What in point of fact *does* the agency actually seek—the removal of mere deadwood barriers or, rather, something else? If it is "something else," what might *that* be?

The easier cases where this form of affirmative action is useful, fair and appropriate, may not now be especially numerous. For one thing, the demand exerted by Title VII itself has been in existence for a substantial period of time, *i.e.*, ever since 1964. And for another, then, too, ordinarily (though *not* always¹⁴) competition will exact a proper cost on an employer or an institution inattentive to the actual relevance of its employment criteria, as employers themselves have considerable reason to know. Today's cases consequently tend to raise some substantial questions¹⁵ including questions about what a given agency's interest truly is and what it actually seeks. Indeed, if not restrained by the courts in some fair measure, the extent to which a demonstration of "job necessity" may be demanded (e.g., by the E.E.O.C. or an equivalent state agency) may become but a means of "racial leverage" to move the person or firm toward a specific practice of racial discrimination in order to forestall the demand itself.¹⁶ At that point, however, there should be no doubt that such actions—including the agency's own

14. The subject is usefully reviewed (among other places) in James Heckman and J. Verkerke, *Racial Disparity and Employment Discrimination: An Economic Perspective*, 8 YALE LAW & POL'Y REV. 276 (with critical comments by Epstein et al. at pp. 299-332) (1990).

15. Such as how great an expense is it *reasonable* to incur to change from one practice to another when the former practice may, in fact, have been well considered and the new one, moreover, may produce but little gain in expanded chances for few additional persons even as it may significantly increase real costs?

16. See *Lutheran Church-Missouri Synod v. FCC*, 154 F.3d 494 (D.C. Cir. 1998); see also Note, *Cutting the Gordian Knot of Affirmative Action*, 22 HARV. J. LAW & PUB. POL'Y 339 (1998).

actions—to encourage racially discriminating against some in order to generate more facially acceptable numbers of others, themselves violate Title VII, certainly as Congress enacted it,¹⁷ though perhaps

17. See text and discussion of Title VII *infra* notes 39-42. See also *Connecticut v. Teal*, 457 U.S. 440 (1982). In *Teal*, the effects of an employer's acts of gratuitous discrimination against some persons were sought to be "corrected" by the employer by acts of outright discrimination against other persons, with the employer ultimately attempting to defend on the grounds that the net effect was a wash, i.e., that the overall resulting work force was of approximately the same racial mix as it would have been in the absence of any discrimination of either kind. *Id.* at 454-455. This was known as "the bottom line" defense. (It acquired this description on the notion that "the bottom line" was that the work force thus worked out racially overall much the same as it would have been had there been no discrimination at all.) The Supreme Court rejected the defense (*id.* at 457) and rightly so. The *Teal* case is, or should be, of pivotal importance for among other things, it firmly rejects the view that an individual's personal opportunities may be measured by race, and that an individual may be discriminated against because of his or her race so long as that person's racial group has been granted its fair share as a racial group. (See *id. generally*; see also e.g., *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984); *Arizona Governing Comm. v. Norris*, 463 U.S. 1073 (1984); *Los Angeles Dep't of Water and Power v. Manhart*, 435 U.S. 702 (1978)).

The theory that the right of the individual may appropriately be measured by race, so that (for instance) whether one is racially ineligible—or less eligible—for employment *because "his" or "her" (racial) group already has "its" share*, or is already "adequately represented," with each race's quota to be measured by the racial fraction of an employer's applicant pool, or racial fraction of customers (as the NAACP now sometimes evidently thinks is appropriate, see *infra*, this note) was thus rejected by the Court in *Teal*. *Teal*, 457 U.S. at 457. Nor was this new. It had likewise been rejected by the Supreme Court many decades earlier, on the grounds that it was utterly inconsistent with the Fourteenth Amendment. See, e.g., *Hughes v. Superior Court*, 339 U.S. 460, 468 (1950) (unanimously affirming a State court injunction forbidding racial picketing to coerce race quota hiring based on racial customer "shares") ("If petitioners were upheld in their demand then other races, white, yellow, brown and red, would have an equal right to demand discriminatory hiring on a racial basis. See *id.* at 363-364. [But] it was just such a situation—an arbitrary discrimination upon the basis of race and color alone, rather than a choice based solely on individual qualification for work to be done—which the court condemned in the first place. See *id.*") Even so, however, the NAACP has resumed efforts to induce boycotts of enterprises in order to compel their agreement for racial hiring in proportion to racial customer shares (although it does not suggest

not as some would now like it understood.

But putting to one side this ill-conceived *misapplication* of particular federal or state statutes as may be reflected in certain de facto employer and agency practices, there is otherwise nothing objectionable to this form of affirmative action and, indeed, there is much to commend it, whether required by laws or not. The elimination of gratuitous barriers to equal opportunity per se disadvantages no one by race. It is conscious of those whom it will benefit (namely, many formerly left out and by no means just those of merely some particular race) but conscientious, too, of those with whom they are then treated identically, neither better nor worse—without indexing or allocating by quotas, targets, goals, or other stratagems of race.

D. There is yet a fourth form of “affirmative” action. It is quite different in one significant respect from what we have reviewed and, as we shall see, potentially subject to some consequences and effects *not* present in the forms of affirmative action thus far reviewed. It also departs substantially from these other forms in a very major respect. This form of affirmative action (if it may rightly be so described) differs because it operates very much with “race in mind,” albeit it does so *only* at a political level of social choice, and not in any other way. It is any action that establishes a higher priority for a particular program or undertaking partly, perhaps even largely or primarily, in anticipation of those expected to benefit “by race,” and to do so even *disproportionately* by race. It may even presume to make a particular program a “*preferred*” program quite expressly on that very account.

In brief, this is action of a kind that declares the comparative worth of one program to be “more urgent” or “more appropriate” than another program because of some *comparatively greater racial group advantage* it will presumably provide. Yet, depending on how such racially-driven choices are carried into effect (*i.e.*, by *whom*,

that such a business practice is appropriate where, under standards of merit and nondiscrimination, African Americans are already employed disproportionately to expenditures by black customers alone (e.g., the NBA). (See Iver Peterson, *Making Big Business a Threat It Can't Refuse*, N.Y. TIMES, Dec. 2, 1984, at 10E.)

and *why*, and in *whose* behalf), proceeding in this fashion is nonetheless *called* "affirmative action," even as a single example may be helpful to illustrate the general idea, and how its reasoning runs.

So, suppose a municipality may have sufficient funds on hand within its current budget giving it a choice between approving a proposal to allocate a million dollars for downtown street improvements or for the improvement of the public library, but not both. And suppose also that it may be obvious in a given circumstance, moreover, that given the location of the library (i.e., where it is situated, who lives nearby, patterns of existing use, etc.) it is very likely that a larger proportion as well as a larger number of the community's "black" population than of its "white" population may take advantage of the improved library, if that is how the money is spent, rather than spent on downtown street improvements as others propose.

The decision to fund the library improvements may be preferred to the decision to spruce up the downtown area. It may even be thought to constitute the "better" choice, moreover, partly "*because of*" the likely racial characteristics of many and, indeed, perhaps most or nearly all of those who will derive the greater benefit. If so, it is thus, in fact, at least partly a "*racially* driven choice." Even so, it may still be regarded as a kind of "affirmative action," nonetheless, for although it *is* done to advance the quality of life principally for "black" residents (because they *are* expected to be its principal users and because the decision *was* made in anticipation of that fact) it also stops right there in its use of race. That is, under no circumstances would any *further* use of race be involved, any more than would have been the case had the funds been spent instead for street improvements, as others had urged be done.¹⁸

This kind of affirmative action is nonetheless highly sensitive on

18. Under no circumstances, for instance, would one also issue "black" and "white" library cards, reserving books by race, or allocating enrollment in reading classes by racial share (such that one becomes "ineligible by race" or "less eligible" if one's racial share has already been "subscribed") or the like.

merit, however, for reasons we shall shortly note, despite what might appear to be the modest and seemingly wholly benign and even uncontroversial example we have just sought to provide. In its favor, there are these two obvious and strong features: (a) it is well designed to be of significant benefit to ethnic minority families (indeed, by design, to be of “disproportionate” benefit to them), even as many will desire and consider it entirely appropriate to do; and (b) it nonetheless does *not* involve any racial discrimination in its operations, so it avoids the odium of any racial discrimination—the books and the reading program are made a part of the public library which does not measure anyone’s eligibility for any of its services, in *any* degree, by race. Rather, it—the library—operates as always, with no race cards, no race quotas, no race preferences, in queuing, in assistance, in service, of any kind. A particular compassion for the comparatively greater benefit to ethnic minority families may have significantly (or even critically) determined the programmatic choice, vis-a-vis the downtown street improvement program, but the choice is made consistent with a firm resolve that there is to be *no* racial discrimination tolerated in the operations or programs of the public library thus enhanced and supported by taxes contributed by all.¹⁹

19. Cf. *Fullilove v. Klutznick*, 448 U.S. 448 (1980); *United Steelworkers v. Weber*, 443 U.S. 193 (1979); *Regents of the Univ. of California v. Bakke*, 438 U.S. 265 (1978). (None of the practices in these cases respected this principle but rather, *all* involved using an individual’s “race” personally to determine their rights of admission or of exclusion as such.) In contrast, the assurance that whatever one’s “race,” academic achievement in one’s high school in the upper 10% (whether that high school be urban or rural, and whether predominantly white or black or brown or of infinite various mixtures and shades in between) will enable one to attend the state university, not excluding even its most rigorous branch, meets this standard. It may well be within a legislature’s discretion so to provide as a generous resolve to encourage all, whatever their race, to do well in what they are given to do. See, e.g., Jod. Wilgeren, *New Law In Texas Preserves Racial Mix in State Colleges*, N.Y. TIMES, Nov. 24, 1999, at A1 (reporting that this mode of providing admission eligibility to the University of Texas, clearly beneficial to a substantial number of previously-ineligible white students (i.e., those graduating in the upper 10% of their high school though not faring necessarily as well on standard national college admission tests) as well as

Despite these strong (and genuinely compelling) features, however, this form of affirmative action may nevertheless raise troubling questions. Not all such questions, moreover, are easily laid aside. The beginnings of that difficulty can be seen merely in considering particular variations on the example already provided. Perhaps we can start with an obvious example of the following ("reverse") sort.

In the case we have just supposed, we noted in passing that the competing priority choice for the million dollar expenditure was for downtown street improvements. And perhaps, such an expenditure might have been seen as more beneficial to "white" residents overall than to "black" residents overall, i.e., even "disproportionately" beneficial to *them*.²⁰

Yet, here, now that we consider the matter, even as a matter of ordinary political scruples, surely this mirror-image scenario should give us pause were that prospect itself to become the very basis on which the majority of the city council resolved its spending-priority choice. And of course it almost surely will. Moreover, actually, even as a matter of virtually settled constitutional law, if it could be shown that the street improvement plan was approved "in order to" carry out a general disposition to make only such expenditures as may benefit whites disproportionately *and* if it could be shown that the library expenditure *would* have been approved instead "but for" the city council's preference solely for white-favoring expenditures, a federal court injunction may be secured against this race-driven preference, such as it is. And rightly so, as I do not doubt most would readily agree. Where such a "race-favoring" effect is not

at least as many previously-ineligible "African-American" and "Hispanic" students, secured much greater public overall than when applicants were admitted or refused by race).

20. It might have been seen as such, for instance, if the majority of business establishments likely to benefit from the proposed street improvements were white-owned establishments. Similarly, if disproportionately more whites than blacks tended to frequent the city's business center (rather than frequent the library), spending for such street improvements as make their activities easier might well have been seen for that reason as the better choice than to spend the same sum on library improvements unlikely to benefit whites so favorably.

simply a consequence of the action, but is rather the very reason why this action was taken (and also why alternative proposals that might have been accepted were instead rejected), it may very well and properly be enjoined under 42 U.S.C. §1983.²¹ Moreover, we may duly note that this is the correct result even assuming that, of course, there is still no discrimination in the execution or in the operation of the street improvement plan, i.e., that of course all black and white persons are equally welcome to take advantage of the better streets and none will be made to stand aside, shop later, or park less conveniently, by any kind of racial preference or test. The taint—such as it is—lies underneath, in the racially partisan, racially driven, motivation of the city council's social preference *plus* the sought after (racially) disparate impact of its action. Its deeper vice is that it embraces a view of the political process that the Fourteenth Amendment does not accept, a view that political control properly entitles one to use that control *as a racial spoils system*. The Fourteenth Amendment meant to drive out, rather than to entrench, such uses of public and of governmental power.

And so, presumably, the same conclusion would follow equally if a library expenditure were favored over downtown street improvements, assuming the decision were nonetheless made on the same improper basis—that the location of the library indicates predominantly white library traffic so that white interests will be preferred over street improvements less helpful to whites albeit more helpful to others by far. As much as this is dictated by mere consistency in the constraint we believe the Fourteenth Amendment itself properly suggests.

But if all of *this* is correct (as it is), however, then the original case also surely raises—or assuredly may raise—some reasonably serious questions on its own account as well, despite the first

21. See *Hunter v. Underwood*, 471 U.S. 222 (1985); *Rogers v. Lodge*, 458 U.S. 613 (1982); *Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977); *Washington v. Davis*, 426 U.S. 229 (1979). See also *Gomillion v. Lightfoot*, 364 U.S. 339 (1960); compare *Personnel Administrator v. Feeney*, 442 U.S. 256 (1979).

impression that it is so clearly distinguishable as many will insist that it plainly is. Is it? How so? To what extent? The implicit assumption in affirmative action of this sort is that it is merely appropriate for government to acknowledge the "special circumstances" of ethnic minorities, at least in its selection of social priorities and programs and expenditures. Thus, the observation will be offered, at least insofar as the programs themselves involve no racial discrimination in their administration, a compassionate resolve to grant priority to such expenditures precisely because they will be of disproportionate assistance to ethnic minority groups must surely be an acceptable form of affirmative action. Or so it will be argued, indeed, has been argued strongly and at considerable length.²²

There is, nonetheless, a considerable naivete entertained within this view, despite its provisional attractiveness as it would seem to be. For one thing, it assumes that the determination of social preference even expressly resolved on racial grounds, at least so

22. See, e.g., Boris I. Bittker, *THE CASE FOR BLACK REPARATIONS* (1973). Many commentators go much further, to be sure, urging that "corrective justice" legitimizes specific overt racial discrimination forms of "affirmative action" as well (indexing persons by race, so to disprefer all those, i.e., "whites," to whom some measure of unjust advantage is assigned. See, e.g., Derrick Bell, *AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE* (1987); Girardeau Spann, *RACE AGAINST THE SUPREME COURT* (1993) (*passim* and *see also* various authors cited at p. 222, n. 113); J. Clay Smith, Jr. *Open Letter to The President on Race and Affirmative Action*, 42 HOW. L.J. 27 (1998); Richard Delgado, *Hugo Black Lecture: Ten Arguments Against Affirmative Action—How Valid?*, 50 ALA. L. REV. 135, 151, 152 (1998) (*opposing* programs qualifying beneficiaries by nonracial standards of "socioeconomic status," rather than (also) by race, if just because "the number of poor whites greatly exceeds that of poor blacks and browns" whom Delgado insists are more deserving or even entitled as such (whether or not poor or relatively well-to-do) on a "restitutive or reparational rationale;" and likewise *opposing* programs merely seeking a broader range of "intellectual or ideological diversity" as such, for that, too, he complains, would substitute a criterion other than race per se and, if neutrally applied, fail to favor "blacks and browns" in the manner and degree Delgado—and others—deem it a high obligation on government to do.) *See also* BRYAN FAIR, *NOTES OF A RACIAL CASTE BABY* (1997)). (*Compare* essays and discussion, in STEVEN CAHN (ed.), *AFFIRMATIVE ACTION DEBATE* (1995).)

long as it is "*racially minority*" favoring, rather than "*racially majority*" favoring, will be ameliorative and healing. Perhaps, though that may require some refinement (and assumptions) in seeing just who is who (e.g., who *counts* as part of some "racial minority" and who does not), and just why things are judged this way. It may also assume (and most probably does assume) that the vast majority of uses to be made of such affirmative action will tend principally to benefit underprivileged persons in general,²³ moreover, and *not* merely certain politically favored, racially-dominate segments within a given community such as it may be. Perhaps, but there is even less reason for confidence in this assumption, such as it tends to be. Indeed, in point of fact it is unclear that *either* of these outcomes will typically characterize these actions, nor can we long deceive ourselves into thinking these sorts of decisions are somehow capable of being made right or lawful only when undertaken "unselfishly" (i.e., only when undertaken by allegedly benign majorities attempting thus to offset such abuses of power as may have occurred in the past²⁴). The obvious problem is that there is nothing inherent in the mechanism we have been reviewing to keep it harmless from extremely selfish and altogether racially-organized capture and racially-organized use. To the contrary, it invites precisely that consequence in real life.

Perhaps to see this point more clearly, start, again, with this. As an original proposition, what we affirm here as a general proposition can scarcely be denied as an equally appropriate

23. (-Which is a substantial feature of the Texas plan (discussed in note 19 *supra*), however, and thus a feature very likely to secure its constitutional integrity; even as the N.Y. Times reported it also does produce within the entering class of the University of Texas a genuine presence of African-American and of Hispanic students virtually as numerous as when the state university used race as a "jump-ahead" ticket of admission as it previously did but was enjoined from continuing to do.) (See also the careful, elaborate review by Kim Forde-Mazrui, *The Constitutional Implications of Race-Neutral Affirmative Action*, 88 GEORGETOWN L.J. 2331 (2000)).

24. Cf. JOHN HART ELY, *DEMOCRACY AND DISTRUST* 170-171 (1980); John Hart Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723 (1974).

measure for a city council to take, though taken, for example, the very first moment new "black" majorities (and/or other self-servingly-oriented ethnic coalitions) suddenly capture urban government and at once resolve to vote for nothing not emphatically conducive solely to their own racially targeted self-interests. Yet, it is obviously doubtful whether such varieties of racial spoils (for such they are) are rightly described as "*affirmative*" action at all. Moreover, it is surely odd, on the face of things, is it not, to hold that the Fourteenth Amendment will forbid controlling "white" majorities to enact only disproportionately white-favoring regulations or expenditures, but to see no equivalent constitutional wrong in permitting or even encouraging precisely such racist preferences in the exercise of power by others. Nor, moreover, is it likely to be conducive to ameliorative (rather than racially polarized) politics at all.²⁵

Whatever its putative virtues, then, what we have been discussing is probably not a proposal that is, in fact, a characterizing feature of an affirmative, mature and compassionate community overall. That such communities ("affirmative, mature, and compassionate") *should* be attentive to the less fortunate in ways cutting across race, *and* that they *should* act affirmatively in selecting among priorities those particularly helpful to disadvantaged neighborhoods or families as such, is entirely unobjectionable. But that they should not proceed in this inclusive way but instead sedulously cultivate the different question (who will *racially* benefit, "us" or "them") is *not* the same.²⁶ The

25. Cf. T. Alexander Aleinikoff, *A Case for Race-Consciousness*, 91 COLUM. L. REV. 1060, 1102-1107 (1991).

26. *But see* references in note 22, *supra*, to sources and authors who would presumably maintain there is nothing inappropriate insofar as (racial) "minority" groups may become a majority and at once vote their collective (racial-coalition based) racial self-interest as such (for in the view of these authors such racial self-favoring would presumably merely carry through just claims by way of reparations and/or restitution (from "white" persons) which ought to be their due in any event; thus *that they follow that ideology once taking power, is merely to secure what was their due*). Thus are matters reasoned in some circles, as a way of "getting beyond race."

reintroduction of fears and of anxieties, so to think in terms of "us" (racially) and of "them" (racially) is altogether predictable, empty, barren, and sterile. It ought not be a part of our destiny. It ought *not* characterize the way we think of one another, or treat one another, at all.²⁷

Even so, it will be said that the realpolitik of American life may, in fact, nurture these realities—these "systems" such as they are and tend to be—and probably neither courts, nor constitutions, nor legislation can practically preclude them altogether,²⁸ nor necessarily should courts attempt so to do though checking the practice at least when it has degraded to the level of an incorrigible regular habit or pattern, marking a "racial spoils system" mind-set of some state or local government, seems well within the competence and constitutional capacity of state and federal courts. And for those who disagree (and so would grant freer rein for racial politics to play out in the fields of organizing politically by race the better to advance racial group interests, and thus to play "capture the flag" so then to say what shall and shall not be funded, where facilities shall be located, etc.), still it is a restraining feature of even this version of government discretion, at whatever level it may tend to operate, it operates consistent with recognizing that whatever the program, project, or undertaking thus undertaken by the government, there is, of course, to be no discrimination in its administration. No individual, no person, is to be "measured for eligibility by race." *No one is issued their racial identity card and told what shall be their racial queue, their quota, their share, their eligibility by race.*²⁹ Wherever the library is to be built, or however few or many the books in the library, or the scarcity or surplus of openings in its reading program, that is never how they are rationed. These things are seen to be what they are—utterly

27. Cf. Kathleen Sullivan, *After Affirmative Action*, 19 OHIO ST. L.J. 1039, 1044-1053 (1998); Jed Rubenfeld, *Affirmative Action*, 107 YALE L.J. 427 (1997).

28. For a thoughtful review of the difficulties, see, e.g., the opinion of Justice Stevens in *Rogers v. Lodge*, 458 U.S. 613, 631 (1982).

29. Compare the statutes and practices which do not keep faith with this minimum assurance, e.g., in the cases cited *supra*, note 2.

demoralizing forms of racial ordering and (in my view) manifest evidence that the people who endure such a system have resigned themselves to the methods of indexing common to quintessentially racist states.

III.

Even so, this different phenomenon now commonplace for various levels of government and institutional centers of power to pursue is also now *called* affirmative action. Whatever it is called,³⁰ however, it is also marked off by a deliberate practice of personalized—and impersonalized—racial “sorting” and, pursuant thereto, by varieties of express racial discrimination as well. So, characteristic of all such regimes, again, it begins first by indexing individuals by race (always this is the first indispensable step—it must be done and it marks the regime); and it measures out to each their place or civil rights in whole or in part according to that racial index, putting some ahead (or behind), or in (or out) by race. It is this action of government and/or of institutional and private practice of encouraging (even requiring) each person to be identified racially, *precisely* for the purpose of distinguishing that person’s

30. Cf. *Wessman v. Gittens* (1st Cir., No. 98-1657, Nov. 19, 1998) at p. 4 (“Attractive labeling cannot alter the fact that any program which induces schools to grant preferences based on race and ethnicity is constitutionally suspect.”) (Granting “preferences” by race is itself but an obvious example of a particular kind of racial discrimination (namely, a kind some strive endlessly to defend), as in presuming to take pride in the extent to which one’s “preference” for a poor white orphan over an equally poor black orphan—or the opposite—advances the education of the one whose “progress,” given the preference, is then cited as the obvious good produced by the plan, while conveniently blanking from one’s mind the means by which it was done. (It is this ability to “blank from one’s mind” that sustains the hubris of what one has presumed to do.) See, e.g., WILLIAM G. BOWEN & DEREK BOK, *THE SHAPE OF THE RIVER* (1998). But see also JOHN H. MCWHORTER, *LOSING THE RACE: SELF-SABOTAGE IN BLACK AMERICA* (2000); STEPHAN THERNSTROM & ABIGAIL THERNSTROM, *AMERICA IN BLACK AND WHITE: ONE NATION, INDIVISIBLE* (1997); Stephan Thernstrom & Abigail Thernstrom, *Reflections on The Shape of The River*, 46 U.C.L.A. L. REV. 1582 (1999).)

civil rights from those of others "different" from oneself by race—sometimes for one's advantage, sometimes not, but in no instance not to have race matter and in no instance not to have race count. It is where we tend to find ourselves even now.

The racial distinction sought to be attached to each of us may be used (even as it still appears to be thus used) to say whom one may lawfully adopt,³¹ just as it was formerly used to say whom one may marry or not.³² The distinction may be made, still by race, even in respect to the very school to which one is assigned,³³ yet even more, even to determine whether one may be admitted *at all*.³⁴ It may well be used, indeed, is and *has* been used, in the determination of mere job-training eligibility—an eligibility "measured by race."³⁵ Racial distinctions are made and sponsored by government in bidding on government contracts,³⁶ and likewise even in the determination of one's eligibility for public housing.³⁷ The new "depersonalized" racial discrimination (including the kind now called affirmative action), just like the old, always has the same (de)vice—it demands (or simply imputes) a person's "race." And it does so, unmistakably, in order to make each person's place or civil rights expressly contingent in whole or in part in keeping with that assignment, neither more nor less.

To be sure, of course these proliferating regimes of racial sorting (and of racial stereotyping— so to determine what shall be done

31. For cases, citations, and a critical review, see R. Richard Banks, *Color of Desire: Fulfilling Adoptive Parents' Racial Preferences Through Discriminatory State Action*, 107 Yale L.J. 875 (1998).

32. See *Loving v. Virginia*, 388 U.S. 1 (1967); *Perez v. Sharp*, 32 Cal. 2d 711, 198 P.2d 17 (1948); *Pace v. Alabama*, 106 U.S. 583 (1883).

33. See *Pasadena Bd. of Educ. v. Spangler*, 427 U.S. 424 (1976); *Brown v. Bd. of Educ.* 347 U.S. 483 (1954).

34. See *Regents of the Univ. of California v. Bakke*, 438 U.S. 265 (1978); *Texas v. Hopwood*, 78 F.3d 932, *cert. denied*, 518 U.S. 1033 (1996).

35. See *United Steelworkers v. Weber*, 433 U.S. 193 (1979).

36. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Fullilove v. Klutznick*, 448 U.S. 448 (1980).

37. See *Otero v. New York State Hous. Auth.*, 484 F.2d 1122 (2d Cir. 1973).

with one), just like the old, are given a justification by those who defend their ramparts and their aggressive use (indeed they are usually given more than one, a matter that itself should give one reason for pause), even as the uses themselves may shift from time to time, and even as do the classifications on which they are built. But then, there is assuredly no surprise in any of this, that “compelling” reasons are thus proposed, for it has *always* been so when government has proceeded by race: however and whenever racial classifications have been deployed under law, in every country choosing a “race conscious” agenda, including our own, compelling reasons of state and of “sound public policy” have *never* been wanting.³⁸ And so it has always been. But one would be surprised if it were otherwise, indeed, for neither people nor governments commonly engage in practices they think will do no one any real good—neither themselves (by their own deliberate acts of discrimination, as sources of continuing empowerment) nor those whom they invite by race to be benefitted or preferred.

Accordingly, *of course* the government *calls* its race-based queues, race-based pluses (and minuses) and assignments by race “affirmative action,” and it seeks to have us adopt its preferred locution (it could hardly call them something else and yet not lose the game). And so we find ourselves, each of us and all of us, once again called upon to inscribe ourselves in some racial format, to be indexed according to (shifting and variable) racial categories, to use each other by race. These programs prescribe racial queues, establish racial set-asides, and set “guidelines” by race. They go further, even to offer tax-funded bonuses paid from public money to those who will undertake personal acts of racial discrimination,³⁹

38. See *DeFunis v. Odegaard*, 416 U.S. 312, 343 (1974) (Douglas, J., dissenting) (“If discrimination based on race is permissible when those who hold the reins of power come up with ‘compelling’ reasons to justify it, then constitutional guarantees acquire an accordionlike [sic] quality.”).

39. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) (contractor who will reject the lowest subcontract bid solely because of the subcontractor’s race, as the government desires, in order that the contractor accept a higher-priced bid submitted by another to whom the government wants the subcontract to be awarded by race, will receive a reimbursement even greater than the

positively encouraging us by outright *paying* us to engage in acts of racial discrimination even now—even at the hinge of this millennial century.

Yet, however pleasing this is to some, even as we lurch and jar in this ubiquitously “race-captured” way, there is a strange measure of Orwellian irony. For under our principal civil rights act, matters ought to be quite different. On its very face—exactly as we noticed as was true of the original Executive Order applicable to federal contractors—the principal section in Title VII of the Civil Rights Act as enacted in 1964 itself disallows racial discrimination, including the kinds the government currently encourages. It thus expressly provided (and indeed still *does* provide⁴⁰) that it is “an unlawful employment practice” for an employer—

to fail or refuse to hire or to discharge *any* individual, *or otherwise to discriminate against any individual . . . because of [i.e., on the basis of] such individual’s race, color, religion, sex, or national origin.*

And, to be sure, in keeping with that provision, the Supreme Court first treated the guarantee according to its own words, expressly declaring (quite in keeping with the statements of the act’s own principal sponsors in Congress⁴¹) that it was straightforwardly an

difference between the two bids. *Id.* at 209. It is thus made “profitable” to practice racial discrimination in one’s business, by government bribe, assuming of course it is racial discrimination of a kind the government thus wants to encourage and thinks appropriate to foster in just this way.). (The most recent rationale for a modified form of this practice is roughly as follows. At step one, one attempts to determine the extent (if any) to which private contractors may have themselves engaged in racial discrimination. At step two, one offers government payoffs to induce private contractors (whether or not the ones previously engaging in any racial discrimination) to discriminate in reverse and/or the government itself equivalently discriminates in reverse, *the sum of the acts of racial discrimination balancing out*, as it were, though of course in no individual way. *See id.* *See also* Ian Ayres and Fredrick Vars, *When Does Private Discrimination Justify Affirmative Action?*, 98 COLUM.L. REV. 1577 (1998).)

40. 42 U.S.C. § 2000e-(a)(1).

41. *See* Bernard Meltzer, *The Weber Case: The Judicial Abrogation of the Antidiscrimination Standard in Employment*, 47 U. CHI. L. REV. 423 (1980); PAUL ROBERTS AND LAWRENCE STRATTON, *THE NEW COLOR LINE* 74-77 (1995);

*anti-discrimination act.*⁴²

Similarly, on *its* face, too, Title VI of the same 1964 act identically forbade (and still forbids) racial discrimination against anyone in just the same way. So, it provided an equally unequivocal assurance that—

No person . . . shall, on the ground of race, color, or national origin, be excluded from participation in any program or activity receiving Federal financial assistance.⁴³

Four of the nine Justices in *Bakke*⁴⁴ took Title VI to mean exactly what it says; they held that the university's use of race that resulted in excluding Allan Bakke for race was forbidden by Title VI, even as the Supreme Court of California had itself understood to be the case.⁴⁵ As Justice Stevens put the matter: "In unmistakable terms the Act prohibits the exclusion of individuals from federally funded programs because of their race. As succinctly phrased during the Senate debate, under Title VI it is not 'permissible to say "yes," to one person; but to say "no" to another person, only because of the color of his skin.'"⁴⁶

But the views of those four Justices notwithstanding, this provision, too, was also fated to be given quite a different (i.e., "newspeak") interpretation. So today, the face of the statute notwithstanding, a person *may* be excluded, and may be excluded on *purely* racial grounds, unmistakably, if per chance too many of his or of her race are already on hand vis-a-vis others (i.e., of other

CARL COHEN, NAKED RACIAL PREFERENCE 116-136 (1995); Francis Vaas, *Title VII: Legislative History*, 7 BOSTON COLLEGE INDUS. & COM. L. REV. 431 (1966).

42. See *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971) ("[d]iscriminatory preference for *any* group, minority or majority, is precisely and only what Congress has proscribed." *Id.* at 431 (emphasis added)). For confirmation, see also JOHN D. SKRENTNY, THE IRONIES OF AFFIRMATIVE ACTION 3, 120-121 (1996); Report to the Attorney General, *Redefining Discrimination: Disparate Impact and the Institutionalization of Affirmative Action* 42-46, Dept. of Justice, Office of Legal Policy (Nov. 1987).

43. 42 U.S.C. § 2000(d) (emphasis added).

44. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

45. See *id.* at 412-421.

46. *Id.* at 418 (quoting 110 CONG. REC. 6047 (1964)).

racess).⁴⁷

Yet, to take just one kind of such a case (specifically, a case to be rationalized by the explanation of seeking, say, “diversity” or “representation”—though of course assuredly not the kind of case the government probably has in mind⁴⁸), if even a Larry Bird had

47. Thus a mere public institutional preference for a different racial mix than can be secured without racial discrimination may provide a basis for such racial exclusion (Justice Powell’s once-offered “diversity” view, privileging public universities to adjust one’s chances for admission downward by race so long as other kinds of adjustments are included and not merely race), or the simple insistence that others are of a more deserving race (Justice Brennan’s and Justice Marshall’s view) make it acceptable, consistent with Title VI, to use one’s race to disprefer them “all things considered” as one may (or may not) be advised when turned away. See *Bakke*, 438 U.S. 265 (1978). (“Diversity” and “doing justice” are today’s most favored explanations for racial discrimination in our public institutions such as they have become, in patronizing students as they now do.)

48. The usual “diversity” arguments seek refuge for racial labeling practices and policies of universities than of professional sports. In that setting, ironically, they rest even more heavily on stereotype assumptions of meaningful differences by race. For just such an example, see, e.g., Arnold Loewy, *Taking Bakke Seriously: Distinguishing Diversity from Affirmative Action in the Law School Admissions Process*, 77 N.C. L. REV. 1479, 1492, 1494 (1999). See also RONALD DWORKIN, *SOVEREIGN VIRTUE* 404 (2000). (Cf. George Sher, *Diversity*, 28 PHIL. AND PUB. AFF. 85 (1999); Randall Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745, 1801-1807 (1989). (Professor Loewy suggests that where most of the students already enrolled in a given class are other than “black,” the state university may determine within the remaining group of applicants for admission—rightly in his own view—that “[a] student with a 3.1 average and a 152 LSAT score may be *better qualified* (sic) than a[nother] student with a 3.4 average and a 157 LSAT score, either because the lesser-numbered student has traveled around the world [as few of the other students may have done] or because he is black.” (See also *id.* at 1492, suggesting that the selection of “the lesser-numbered” (“black”) student jumped over other applicants on racial grounds, when there are few of his or her race currently enrolled, should meet with no objections from them—because he is better qualified [in being “black”] in much the same way as when an NFL team needs a placekicker it currently lacks, i.e., what is needed is one vital to the overall team’s success and better than others (who are not so good in placekicking) in a particular role. (“Being black” is the equivalent role.) But what is going on here? (Is it not this, as Louis Lusk observed more than three decades ago: “The stereotype still holds us in thrall.”) (Louis Lusk, *The*

been selected over another to play for the Boston Celtics, the better to integrate the team (to provide some "*better racial balance*" were it, without him, overall too lacking in suitable diversity), he would then also have been merely one more beneficiary of racial discrimination, and obviously so. Moreover, that Larry Bird would have been its beneficiary rather than its victim, *and* that he was a most skillful athlete, does not mean that there was no racial discrimination, and no "real" or measurable harm to anyone else by race or any loss. There was, or would have been if this had been the case, to *whatever* extent and in *whatever* way "race" would have been attributed to Bird and then utilized to determine *his* selection

Stereotype: Hard Core of Racism, 13 BUFFALO L. REV. 450 (1964.)

By mere parity of reasoning, Professor Loewy must (as I believe he does) likewise conclude that, quite equivalently, a "white" student with a 3.1 average and a 152 score" is likewise "better qualified" than "a 'black' student with a 3.4 average and a 157 LSAT score," where both apply for admission to a state law school which happens to have enrolled few, if any, other "whites." But I think few would straight-facedly presume to say that this "lesser-numbered"(sic) "white" student was in fact *better qualified* than . . . whom? The displaced black applicant? Really? Who would *dare* so to say.

Compare, with Professor Loewy's view, the different suggestion by Justice Douglas (*De Funis v. Odegaard*, 416 U.S. 312, 343 (1974) (Douglas, J., dissenting): ("A segregated admissions process [i.e., a process applying racial nonuniform standards for admission of the kind reflected in Professor Lowey's examples and in the *De Funis* case itself] creates suggestions of stigma and caste no less than a segregated classroom, and in the end it may produce that result despite its contrary intentions.") See also JOHN H. MCWHORTER, *LOSING THE RACE: SELF-SABOTAGE IN BLACK AMERICA* (2000); STEPHEN CARTER, *REFLECTIONS OF AN AFFIRMATIVE ACTION BABY* 56 (1991) ("That gushing [i.e., "that gushing" of other students, referring to the praise one receives but cannot trust] is part of the peculiar relationship between black intellectuals and the white ones who seem loathe to criticize us for fear of being branded racists—which is itself a mark of racism of a sort"). N.Y. TIMES, Dec. 20, 1999, at A35 (reporting on confirming stereotype role of specially recruited students by race) "[M]any minority students say they find themselves . . . sought out unnaturally for trophy friendships, and constantly the subject of speculation over whether they are qualified or are taking the spot of someone more deserving."); THOMAS SOWELL, *PREFERENTIAL POLICIES: AN INTERNATIONAL PERSPECTIVE* (1990); THOMAS SOWELL, *BLACK EDUCATION: MYTHS AND TRAGEDIES* (1972).

in preference to another player identified by that other player's different racial label *and passed over on that account*. Nor of course (to consider another kind of "justification" that some now vigorously press⁴⁹) that most or even all of the particular audiences before whom Bird (and the Celtics) may have played may well have contained an even larger fraction of ticket-buying patrons "of his race," than he, by his presence, may (in this scenario) have provided on the team, is surely neither here nor there in affecting our thoughts. It would not deny or diminish the fact of racial discrimination in the stipulated circumstances, nor excuse it in any degree. Nor would it lessen the obvious harm involved to another, the rejection—their race-based demotion—of *whoever* it was who sought no more than to be considered without "minus points" because of his race, but, once given those minus points, was left out.

So, whatever success Bird had, however his play contributed to the satisfaction of Celtic management, or the enhanced joy of the watching crowds of fans, it would not alter the fact and real stain of racial discrimination stipulated in his selection, *if this were the way it occurred*. But so it is, however it is done, in *all* these arrangements, as we should all be able to understand and to see. Underneath all the explanations, defensive, aggressive, angry, indignant and otherwise, moreover, I suspect we do.

IV.

Many decades ago, reflecting his agreement with Justice Harlan's own position in an earlier time,⁵⁰ and anticipating Justice

49. (See discussion *supra*, note 17, of efforts by the NAACP to induce racial discrimination in employment practices in proportion to racial patronage, evidently thinking it entirely appropriate to expect a matching along these lines.)

50. See *Plessy v. Ferguson*, 163 U.S. 537, 555 (1896) (Harlan, J., dissenting) ("[Our] destinies . . . in this country, are indissolubly linked together, and the interests of [all] require that the common government of all shall not permit the seeds of race hate to be planted under the sanction of law. The sure guarantee of the peace and security of each race is the clear, distinct, unconditional recognition by our governments, National and State, of every right that inheres in civil freedom, and of the equality before the law of all citizens of the United

Douglas' view as well,⁵¹ Justice Murphy of the Supreme Court had put the essential matter we have been considering still one more time in just the following way:

Racial discrimination in *any* form and in *any* degree has *no* justifiable part whatever in our democratic way of life. It is unattractive in any setting but it is utterly revolting among a free people who have embraced the principles set forth in the Constitution of the United States.⁵²

States without regard to race.”)

51. See *DeFunis v. Odegaard*, 416 U.S. 312, 337, 343-344 (1974) (Douglas, J., dissenting) (emphasis added) (“A [person] who is white is entitled to no advantage by reason of that fact; nor is he subject to any disability, no matter what his race or color. So far as race is concerned, *any* state-sponsored preference of one race over another . . . is in my view ‘invidious’ and violative of the Equal Protection Clause.”)

52. *Korematsu v. United States*, 323 U.S. 214, 242 (1944) (Murphy, J., dissenting). See also *Adarand Constructors, Inc. v. Peña* 515 U.S. 200, 240 (1995) (Thomas, J., concurring) (“[U]nder the Constitution, the government may not make distinctions on the basis of race . . . Purchased at the price of immeasurable human suffering, the equal protection principle reflects our Nation’s understanding that such classifications ultimately have a destructive impact on the individual and our society.”)

Justice Thomas’ views have been particularly scorned, to be sure. It is evidently forgotten (or perhaps *not* forgotten) by some of those most inclined to do so, however, that it is *Justice Thomas* and *not* they, who now scorn him, who faithfully echoes what those who litigated *Brown v. Board of Education*, 347 U.S. 483 (1954) urged before the Supreme Court nearly half-a-century ago. See, e.g., opening argument of Robert L. Carter in *Brown* as referenced in Phillip Kurland & Gerhard Casper (eds.), 49 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT 278 (1975) (emphasis added) (“We have one fundamental contention which we will seek to develop in the course of this argument, and that contention is that no state has any authority under the equal protection clause of the Fourteenth Amendment *to use race* as a factor in affording educational opportunities among its citizens.”) *Id.* at 287.

See also the oral argument where Carter argued to the Court, that it was not bound by its own prior decision in *Gong Lum v. Rice*, 275 U.S. 78 (1927), precisely because, he observed, in *Gong Lum*, the petitioner did not take this position (rather, as Carter quite rightly said, the petitioner in that case “did not at all contest the state’s power to enforce a racial classification” but had merely

And still we—or many of us—seem not to believe it, for the agencies of government (including even the Congress of the United States) continue to use, and to encourage, varieties of racial discrimination, racial allocative devices and rationales. Still, it may not be helpful to pile up more mounds of examples.⁵³ Rather, it is more than time to bring this brief review to some kind of repose. Briefly, then, to summarize where we are and where we have been.

Among the forms of affirmative actions we have reviewed, one is pro-active in what it commits us to do, namely, to take active measures to ensure to each person that they will not—will never—be treated less well than others because of their (imputed) “race,” even as the original Executive Orders applicable to federal contractors imposed a duty on each of them so to conduct themselves. Of two

challenged how it was used), whereas here, in *Brown*, Carter declared, petitioner *does* contest that power. Indeed, as he has already observed, it is the point of this litigation to persuade the Court that the Fourteenth Amendment strips any such claim of power from every state. *Id.* at 287. The proposition is *exactly* what Justice Thomas accepts, agrees with, and adopts as his own, in his well and strongly stated view *supra*.

53. But see how (even) a state commissioner of *prisons*, acting pursuant to encouragement by the Federal Law Enforcement Assistance Agency, presumed to install his own program of racial discrimination in deciding who, in what (racial) order, was to be promoted and *not* promoted, within the prison staff subject to his authority. (Promotions of prison employees were to be determined by race, to adjust the racial composition of the prison workforce more nearly to match the racial composition of the prison inmate population within the prisons where they worked.) *Minnick v. Cal. Dep't of Corrections*, 95 Cal. App.3d 506 (1979), *cert. dismissed*, 452 U.S. 105 (1981). (*But see* the dissenting opinion by Justice Stewart (452 U.S. at 128) (emphasis added) voting to review this case and reverse outright because, in his view, the state court had “*wrongly* held that the State may consider a person’s race in making promotion decisions.” He went on to declare his position, quite as unequivocally as had Justice Douglas likewise declared his own in the *De Funis* case, in just the following way: “So far as the Constitution goes, a private person may engage in any racial discrimination he wants, cf. *Steelworkers v. Weber*, 443 U.S. 193, but under the Equal Protection Clause of the Fourteenth Amendment a sovereign State may *never* do so. *And it is wholly irrelevant whether the State gives a ‘plus’ or ‘minus’ value to a person’s race, whether the discrimination occurs in a decision to hire or fire or promote, or whether the discrimination is called ‘affirmative action’ or by some less euphemistic term.*”))

more extended forms of affirmative action, one of these—the first—is that which seeks to secure a periodic and conscious review and revision of such practices and policies as may, in fact, contribute marginally (if at all) to the mission or productivity of a given enterprise, educational or otherwise, even while adversely shutting out significant numbers from consideration, as there is no fair need so to do. To the extent that modifications in institutional practice can extend access and opportunity to previously ineligible persons, these modifications have *always* been worth encouraging (indeed, they came to be expected pursuant to Title VII), even as it may be additionally appropriate to consider the subsidy of such programs as may be helpful to that end. And there is still another form of acting affirmatively toward our fellow citizens (now seriously neglected). It is to be conscientious of all who have less than ourselves, all who tend to be left out, electing domestic priorities to put a renewed emphasis upon those programs and constructive forms of assistance to raise the real opportunities of disadvantaged people so to have a fairer chance to have productive lives as equal citizens. This, too, is affirmative action, among the best kinds, the more so because it puts no boundaries on compassion for the poor or out-of-work by race, and seeks no mere divisions of a “zero sum” game by race.

And beyond these measures? Beyond these measures, almost certainly the better role government can aspire to is to set a more admirable example than it has, to be a better example for others to follow,⁵⁴ and *never* seek to encourage, much less to require or to subsidize, acts of racial discrimination in our public life.⁵⁵ Moreover, whatever the government may do, and whether it continues its current practices or can be made to give them up, for

54. See *Olmstead v. United States*, 277 U.S. 438, 485 (Brandeis, J., dissenting) (“Our government is the potent, the omnipresent teacher.”).

55. The power also resides in Congress to forbid any agency of government, at any level whatever, including state and local government, from utilizing any person’s race for purposes of qualifying or of determining any right, privilege, or obligation under law. Indeed, it is not suitable constitutional power to take just *this* kind of affirmative action that is wanting, rather, it is merely the will.

all who desire always to act affirmatively, the principle is clear, and the answer is where it has always been, in the personal affirmation of our common humanity: that each is yet a whole person whom it is improper to count or to discount by race, to grade or degrade by race, to sort through or presume to assign to some "appropriate" racial queue. Affirmative people, I think, do not welcome either of these systems as such or the suppositions or *modus operandi* with which these systems operate, to shuffle, to arrange, and so to dispense . . . by race. Moreover, in not welcoming them, I do not think that such people forget history, as some writers presume to say they do. Rather, I believe quite the opposite—it is they who remember history very well. It is, moreover, in *remembering* history that they have learned from it one of the more profound lessons that life can teach.

Appendix and Epilogue

In countries where people of more than a single "race" or "ethnic group" find themselves seriously vexed with one another, race conscious solutions are commonplace. Things generally sort themselves out in one or more of the following seven ways that are "*race conscious*"—the ways that "*make race count*."

I. Subordination By Race. Among the most common means of making race count, historically and in several nations today, is simple subordination by race—establishing racial hierarchies of position and place, of the racially superordinate and subordinate, superior and inferior, higher and lower. Racial identity is assigned,⁵⁶ rules of deference are fitted into place, fixed by law and by custom—of who yields to whom, of rank and racial position. Clarity and certainty are thus sought to be furnished in these regimes of "to each according to race," hierarchically arranged, and strictly enforced.

Institutionalized race slavery—a most common practice

56. —A feature of *all* the items in this taxonomic list save the last . . .

historically (and far from unknown even now)—fits solidly within this model. Strict caste systems assuredly do so as well. Prominent de jure and de facto regimes and practices of institutionalized racial subordination obviously extend through far greater refinements than these, however, without losing the essential characteristic the model itself provides.

Often employed (indeed, in one form or another, subordination by race is probably still the single most commonplace manner to “make race count” worldwide), this *modus vivendi* of taking race into account yet requires constant vigilance against the smoldering resentment likely to be felt by those difficult to convince of the justice of their subordination. Eventually, on that account, it may simply give way to some more “perfect” resolution profiled in this list: other ways of making race count.

II. Elimination By Race. A still widely employed response to internal racial ennui and racial angst within a given society, this kind of race-conscious action seeks to bring racial frictions and anxieties of racial differences within a country or nation to a suitable end, foreclosing further friction, by “having it out.” It is, to paraphrase Hamlet, to act to take arms against a sea of troubles, as it were, and by opposing those troubles, bring them finally to an end.

Vexations of racial difference and conflict end by identifying and by killing every member of an identified race—systematically ferreting them all out, extinguishing all of them, leaving none to be noticed, to grieve or to seek revenge, or to be visible as a remnant or reminder of what they might be like..or once were. Its object is extinction. It means to provide—or restore—homogeneity of race. Its reasoning is both very cool and intensely hot. It is a solution seeking to be a “final solution,” such as this manner of solution seeks for itself. If we forbear from dwelling upon it more at length, it is not from supposing that it has passed from the scene. Assuredly it has not.

III. Expulsion/Exclusion By Race. Something less grisly and grim is the ambition of those who use race in this way. All that is sought here is relief from racial differences by ending those differences, not by mass killings, but mere transportation as it were. This mode of affirmative action is even now a fairly common technique of resolving racial tension, as we well know. Indeed, we have frequently seen it in various states in different parts of our world, most recently in the Balkans as we watched within the past year or so. It is merely a question of who (by race) stays, and who (by race) goes. Its object is otherwise identical to that in the previous model. It puts an end to racial differences, as it were, by putting an end to different races within the state.

IV. Separation By Race. The object here is indistinguishable from the object in the two preceding models, that is, still again to end the vexations of racial difference simply by eliminating all domestic differences of race. But the means to that end are different, and seemingly much more benign. They are characterized by a principle of "equal treatment and equal respect" by race—neither to exterminate nor to expel (thus "cleansing" the nation), but rather to divide and go one's own way.

The idea is to seek some final division first by moving interior populations around to provide more perfect racial homogeneity by geography, and then by peacefully separating into new separate sovereignties, each complete in itself. New boundaries will be drawn such that essentially each race may then be exclusive, separate, and secure within its own boundaries, the division to take place on this seemingly respectful principle: "To each their own, according to race." Here, the principle as applied simply means: "To each, by race, their *own* national state."

V. Federation By Race. Here, racial homogeneity merely within different states constitutive of the larger intact national state is the way of accommodation, rather than dissolution and separation in the large sense of breaking up a nation into two or more separate sovereign nations or states. Thus, as one example of "federation by

race," a national state may itself be subdivided along carefully drawn lines, the better to perfect a number of racially distinctive, race-based states *within* a single country or nation, each with a significant degree of local power albeit preserving still a national legislature,⁵⁷ to which race-based constituencies, acting through elections within racially-homogeneous states or other race-based political subdivisions (such as they may be) direct "their" representatives (i.e., the representatives of "their" race). As a lesser-included variation, using still the same model, even smaller political subdivisions such as a county or a town, or even a mere congressional district, may be deliberately gerrymandered by race (so to assure the almost certain election of representatives themselves of a particular "race"). It is a familiar model, indeed, not unknown, even encouraged, in the United States.⁵⁸

VI. Segregation By Race. Resolving racial differences by segregation, as distinct from separation along more sharply defined demarcations, embraces a vast range of devices, from some seemingly very minor, to others more substantial, and, according to one's taste, to still others multiplied and extended until they may reach an exceedingly grand scale. As a strategy of coping with (i.e., "reconciling") racial differences, moreover, these arrangements are so numerous and so varied that perhaps a single standard model is awkward to describe.⁵⁹

Still, however these accommodations may vary in scope or

57. With limited legislative jurisdiction on matters affecting the nation as a whole, (e.g., national defense, foreign relations, a common currency, passage and unencumbered free trade among the states).

58. The obvious reference here is to the various efforts to carve voting districts by race. *See, e.g., Shaw v. Reno* 509 U.S. 630 (1993). *See also* the discussion *infra*, next section ("Segregation").

59. Indeed, the immediate preceding model (of racially-organized subparts of a federation, or racially-organized subparts of a city or of a state) is itself but an example, of *large scale* segregation by race. Perhaps it would be suitable to describe such arrangements—large scale segregation—as "grand apartheid" while what is here to be considered is apartheid on somewhat lesser scales—"petty apartheid" in varying degrees.

extent, they all exhibit a common technique. From the most trivial (e.g., mere provision for racially separate restrooms, assuring to each a place, a sense of personal security and privacy of mere toilet by race) to the most substantial (e.g., the redirection of people by race into racially-homogeneous political subdivisions), the basic idea even here is much the same as in the two preceding models, inside a continuing, ongoing society or state. The model and its guiding principle remains pretty much the same as noticed in every case so far reviewed: "*To each race its own.*"⁶⁰

Then, if one inquires more concretely ("to each race its own *what?*"), the answer that is forthcoming is to paraphrase Bob Dole. The answer to the question is . . . "whatever." Or, more concretely, "just whatever seems best." The model does not demand any particular answer. It leaves such details to the affected parties themselves to decide.

"To each race its own" may be merely separate sections of buses (for example, the back or the front of the bus, or the left or right side of the bus), or even whole buses, separately identified, even as they may also be separate schools, set aside theaters, or whole towns or—even as exhibited in an earlier model—whole states. In brief, it is whatever racial planners finds mutual solace in so arranging matters, i.e., *whatever* racial enthusiasts believe it ought appropriately to include.

So, to offer still another example, "to each race its own" may mean, "its own neighborhood."⁶¹ Or it may (though it need not) extend also to "its own *schools.*"⁶² Or, indeed, along a different

60. —Or (the same thing) "to each its own *according to race.*"

61. —That is, an ethnically (racially) comfortable, congenial and familiar neighborhood, free of racial tensions because peopled with one's "own" reassuring neighbors such as they are (each easy to recognize racially, no discernible racial difference from oneself).

62. —All the better, one would say (and some *do* so say), to insure one's "own" curriculum, one's own teachers, books, and common school culture, each thus most suitably "responsive" to one's *own* needs, and also to one's *own* interests according to the constant principle of "to each its own according to race".

dimension it may extend also to "*its own representatives*" as well.⁶³ And so it—this principle (one can fairly call it a "principle" such as it is, "to each race its own") may take hold and proceed even in an ever-widening gyre of things to be included in its embrace. *Where* it stops (we have already noticed it may quite coherently embrace even the idea of "to each race its own state" or "its own municipal or congressional voting district *by race*") the model per se does not presume to decide. Local or national circumstances may simply decide such matters, such as those circumstances are.

Still, *whatever* the degree and kind of such encouraged—or even required—segregation, and at *whatever* level it is maneuvered into place, it will but capture, report, and reflect just one more time the "race consciousness" of those thus strongly inclined to appease it in just this way. By the same gesture, its enactment will also reflect the commensurate degree of racial *discomfort*, of racial *mistrust*, of apprehension, and of anxiety that is thus sought to be relieved by the extent and extensiveness of this race-based *modus vivendi* under the general rubric: To each their own according to race.

To be sure, complaint is often made of these arrangements, that regimes conducted in the image of this model, have fallen short. They have "cheated," in that things were indeed separate, yet not equal. In respect to many such regimes, that is, it will be fairly declared of them that they were corrupted as but regimes of "separate *and unequal*" by race.⁶⁴ If so, let it be admitted, however,

63. I.e., very much as in the "federation" model of using race previously examined, as in drawing racially-based (thus deliberately racially-segregated) voting districts, so to maximize racial homogeneity within each: that "each race" may be better assured of "*its*" representation (i.e., representation "according to race.") And so, indeed even now, whole cities and counties, and whole states (some on their own initiative, others under a degree of federal duress), still see hope in *segregation*—in the principle of to each its own by race—as a sound means to "reconcile" felt racial differences. Here, the principle struggles to be born again, to live again, thus to fence by race, to separate, and to concentrate voters "according to race." The government is assembled on the bedrock of racial segregation of voters, to representatives elected on the enduring segregationist bedrock principle of "to each race its own."

64. Actually, then, in any such circumstance, however, this is but a variation

it is not a fault intrinsic to the model. The model need not yield to that complaint per se. All that needs to be done, one may suggest, to avoid the sting of such criticism, is to act with a more equitable and appropriate resolve, the better to insure the fuller integrity and more genuine equality of things—things nonetheless respectively to be apportioned consistent with *this* “principle”—*To each race its own and to each its own according to race.*

VII. “Rights by Race” in The “Integrated” State. There are many in fact who continue to see in this last model we have just reviewed, a compelling degree of political allure. In fact they energetically pursue mere variations of the model even now, racially planning, racially arranging, still in keeping with the notion—to each its own share according to race. To be sure, they would resist the description of what they support as having anything in common with what we have just reviewed (“segregation”), but they use its principle of racial segregation nonetheless in point of fact, and they aggressively employ its taxonomy and its very means.

—So, they do, for example, in segregating job applicants (by race), and in segregating test scores by race, even as they do in segregating government contract bids by race, and whatever else seems appropriate thus to segregate by race *and then to dispense*. “Arranging” personal rights by race (the model we now examine briefly), paradoxically itself draws on the principle that is steadfastly racist (and indeed racially segregationalist) in its essential technique. And, as in every previous instance we have briefly reviewed, it proceeds still according to some variant of this principle: “*To each—in whole or in part—according to race.*”

So, to illustrate the point, consider the designated racial gatekeeper employed in a particular public institution, say, perhaps as an admissions officer at the plant or school. He or she will follow this practice: “Here’s an application from a student.”⁶⁵ This file bears

of the *first* category, of racial hierarchies arranged by law, i.e., of “subordination” according to race.

65. (—Or in a different setting, merely with a different government racial gatekeeper, a file from a contractor, a teacher, a bricklayer, or athlete seeking a

the name of 'Tiger Woods.' Here's another, this one from a 'John Morales.' Here's another, from a Ms. 'Lucia Lee'. And other files, and more files still: 'Leon Cao,' 'Shirley Huang,' 'M.L. Thurman,' 'Peter Grey'"

Next, in turn, the question becomes (for the gatekeeper): "Where am I to direct *this* file of this person, this 'Tiger Woods'? Perhaps into the bin over *here*, the bin for persons labeled 'mixed'? And in turn, where shall I likewise direct this other file, of this 'Leon Cao' (he sounds Vietnamese—do we *have* a category for 'Vietnamese' or just this larger one, of 'Asians'? . . . did we think the 'Chinese' are indistinguishable, or distinguishable, from the 'Japanese'?). And this fellow, 'M.L. Thurman,' what race is he"

And so forth, routinely, by file, by racial category, by racial and ethnic bin.

So, adhering as we are wont to do, to sort things out among some prescribed racial categories, we sort this out just so: *make* the judgment, *check* the file—against the possibility of mistake; then place each where it properly belongs, segregated and stacked, among the rising piles of larger and of smaller stacks, perhaps even literally (if not literally then still functionally, say, with telltale identifying "pluses" and "minuses," or however the coding is racially graphed).

Next, we take from the top of each whatever number is required such that, when mixed with the like-selected files from the other respective stacks, a desirable distribution of "rights by race" within the unit formed in just this manner is now assured. Shuffling back-and-forth among racial stacks in some predetermined proportion, we get a fair reflection of "to each according to race." The principle writ large, in all we do? It is the state's own racial adaptation from what one has seen at Baskins & Robbins. Its principle is this: "*Take a ticket from the machine appropriate to your race, and wait until you are called.*"

And so it goes from day to day. In *every* instance, as we stand in line and wait our turn, of course, there is a fine racial screening,

tryout).

and a certain degree of squeezing of a person into some coarse racial niche, fitting them to the grid, tucking and trimming the edges, even as in some procrustean fable, to slip each into some defined box: racial counting, sorting, of mine and thine, layer on layer of the race-attributing, race-counting, incorrigible state. But so we conclude this brief serial review, of the various ways—the roughly seven ways racially angst-ridden societies plan, decide, and act. They are all different, yet all the same: forever and always, *they make race count, they use each of us by race.*

Across a divide, in another place, there exists a single different constitutional model. It has nothing in common with these seven ways. It measures *no one* by racial categories, and *no one* by racial lists, or indexes, boxes, labels, quotas, shares, entitlements, and racial queues. Here, indeed, race is the measure of *nothing* dispensed by its laws nor does anyone desire that it ever should be. And however things once were otherwise, or however they may be still be elsewhere, there is a common resolve that they are never to be that way again. Here, as a consequence, there are no places where one will go that are characterized by an array of machines near the entrance, whether figurative or literal, fronted by the following sign: “Take a ticket from the machine appropriate to your race, and wait until called . . .” The machines, such as might once have been there, have all been removed. They are gone, one and all, discarded, dropped in a landfill. And none save some neo-racists miss them in the least.⁶⁶

66. But how, one may ask did this happen? (How, indeed, than by *affirmative* action—it was an affirmative action that swept them all away.)